



Washington State Executive Ethics Board

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PRELIMINARY INVESTIGATION AND BOARD DETERMINATION

CASE NUMBER:

2011-032

DATE:

March 16, 2012

RESPONDENTS:

Gerald Ballard, Management Analyst 4

EMPLOYING AGENCY:

Office of Minority and Women's Business Enterprises

I. INVESTIGATION

A. Background and Summary of Complaint

The Executive Ethics Board (Board) received a Whistleblower Investigative Report from the State Auditor's Office (SAO) alleging that Gerald Ballard with the Office of Minority and Women's Business Enterprises (OMWBE) may have violated the Ethics in Public Service Act by using state resources to conduct personal business.

B. Scope of Preliminary Investigation and Relevant Facts

Board staff reviewed the complaint and the following documents:

- SAO Whistleblower Investigative Report.
- Respondent's response through his attorney.
- Forensic Summary Report from Mr. Ballard's computer hard drive.

Based upon the preliminary investigation, the facts appear to be as follows:

1. Mr. Ballard was employed by OMWBE on February 6, 2006, and has been so for all times pertinent to this investigation.
2. On February 6, 2006, and February 6, 2009, Mr. Ballard signed the OMWBE's Conflict of Interest and Standards of Ethical Conduct Policy indicating that he had read the policy.
3. On February 3, 2009, Mr. Ballard signed the OMWBE's policy on Internet Usage, Computer Software Usage and Electronic E-mail Usage indicating that he had read the policy.
4. On February 8, 2010, SAO received an anonymous complaint alleging Mr. Ballard was using his state computer to conduct day trading and monitoring stocks for personal profit during work hours.

5. On April 1, 2010, OMWBE Director Cynthia Cooper held a meeting with Ms. Canorro (Mr. Ballard's direct supervisor), Ms. Wheat, Ms. Momi Friedlander and Mr. Ballard to discuss the use of state resources to conduct stock trading. As a result of that meeting Mr. Ballard admitted to monitoring financial and stock websites periodically during the day for 15 to 20 minutes at a time. Mr. Ballard also acknowledged that his activity of monitoring the financial and stock markets were not a part of his job assignment with the OMWBE and that it was improper conduct.
6. Director Cooper issued an oral reprimand to Mr. Ballard and advised him to stop the improper activity immediately. Mr. Ballard estimated his total time spent monitoring the stock market was approximately 8 hours. Director Cooper advised Mr. Ballard to reimburse that time to OMWBE. Finally Director Cooper ordered Mr. Ballard to contact the Department of Personnel's Employee Advisory Services within the next week.
7. On April 8, 2010, a memo outlining the allegations from Jean Wheat and Momi Friedlander, Mr. Ballard's acknowledgment of the allegation, and expectations from Ms. Canorro were placed into Ms. Canorro's supervisory file of Mr. Ballard.
8. After Mr. Ballard was reprimanded by Director Cooper he continued to view stock trends on his personal cell phone at work. One coworker stated that during the times when there was high volatility in the stock market Mr. Ballard was gone from the office quite frequently.
9. On April 23, 2010, Tara Lindholm, SAO, received Mr. Ballard's hard drive from his work computer.

The analysis of the computer hard drive revealed evidence to support the allegation that Mr. Ballard was using his work computer to non-work related business. Some examples of the improper use are:

- 456 visits to E*Trade. com between August 2007 and September 2008.
- 90 visits to NASDAQ in February, August and September 2008 and July 2009.
- 77 visits to a personal banking site in September 2007 and April, July and September 2008.
- 646 files related to stock trading that were saved on the hard drive.
- 11 e-mails with non-work related content:
 - 4 regarding a real estate transaction.
 - 7 included stock and trading information.

10. In a written response to the allegations, Mr. Ballard wrote that he would involve his co-workers in discussing the mechanics of the market. He talked with one coworker at length over a three week period. These lengthy conversations disrupted and distracted the conduct of the state's business. These discussions also obligated his coworker to make a personal use of state

resources.

11. The SAO investigator interviewed some of Mr. Ballard's coworkers. They all said that they have seen him using his state computer to trade stocks. One of the coworkers stated, "I've seen him on E*TRADE on his computer. He was not secretive about his internet stock trading. He approached me and showed me the site on his computer. He was on that site everyday so he could follow the trends." Another coworker stated that he spent at least half of his work hours trading stocks, on a daily basis.
12. The stock markets open for trading on the east coast Monday through Fridays at 9:30 a.m. to 4:00 p.m. (EST), 6:30 a.m. to 1:00 p.m. PST. OMWBE office hours prior to October 20, 2008, were Monday through Friday 8:00 a.m. to 5:00 p.m. After October 20, 2008, OMWBE office hours changed to Monday through Thursday, 7:00 a.m. to 6:00 p.m.
13. On Thursday, June 19, 2008, at 9:12 a.m., Mr. Ballard sent an e-mail from his work computer stating, "Although standing on the pier, you may get the opportunity to board on the pull back. As you know yesterday the high was 5.8 and today's high was (so far) was 5.62 with normal volume. The pattern started today was different from the last two days, it did not drop at the opening then climb, it climbed then dropped. So the pull back started and I watched my profits erode, I sold it for a 18% gain instead of 25%. So now it becomes important to watch it daily for the next several weeks for the buy point."
14. On Wednesday, January 16, 2008, at 10:44 a.m., Mr. Ballard sent an e-mail from his work computer stating "You are right they are taking a bad hitting. However, knowing that it's a traders market (not long term investing) I was able to buy a dip and a pop to the tune of \$5300 today. Dip and a pop means to buy when it dips and sell when it pops up. That works when the market is trying to find direction-which way it will go, up or down."
15. As a result of the SAO investigation, the OMWBE conducted an internal investigation into the allegations. The internal investigation concurs with the SAO's investigation that Mr. Ballard misused state resources.

II. APPLICABLE LAW AND ANALYSIS

The complaint alleges violations of the following sections of the Ethics in Public Service Act and OMWBE Policies:

RCW 42.52.160(1) – Use of persons, money, or property for private gain, states:

No state officer or state employee may employ or use any person, money, or property under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another.

WAC 292-110-010 states, in pertinent part:

(1) **Statement of principles - stewardship.** The proper stewardship of state resources, including funds, facilities, tools, property, and employees and their time, is a responsibility that all state officers and employees share. Accordingly, state employees may not use state resources for personal benefit or gain or for the benefit or gain of other individuals or outside organizations. Responsibility and accountability for the appropriate use of state resources ultimately rests with the individual state officer or state employee, or with the state officer or state employee who authorizes such use. State officers and employees should ensure that any personal use of state resources permitted by this section is the most efficient in terms of overall time and resources.

(2) **The following are permitted uses:**

- (a) Use of state resources that is reasonably related to the conduct of official state duties, or which is otherwise allowed by statute.
- (b) An agency head or designee may authorize a use of state resources that is related to an official state purpose, but not directly related to an individual employee's official duty.
- (c) An agency may authorize a specific use that promotes organizational effectiveness or enhances the job-related skills of a state officer or state employee.
- (d) A state officer or employee may make an occasional but limited personal use of state resources only if each of the following conditions are met:
 - (i) There is little or no cost to the state;
 - (ii) Any use is brief;
 - (iii) Any use occurs infrequently;
 - (iv) The use does not interfere with the performance of any officer's or employee's official duties; and
 - (v) The use does not compromise the security or integrity of state property, information, or software.

(3) **Permitted use of computers, electronic mail, the internet, and other technologies.** A

state officer or employee may use equipment such as the telephone, the internet, and electronic mail provided such use conforms to ethical standards under subsection of this section, and the use is not otherwise prohibited under subsection (5) of this section. . . .

(5) **Prohibited uses.**

- (a) Any use for the purpose of conducting an outside business, private employment, or other activities conducted for private financial gain;
- (b) Any use for the purpose of supporting, promoting the interests of, or soliciting for an outside organization or group, including, but not limited to, a private business, or a political party, or supporting, promoting the interests of, or soliciting for a nonprofit organization unless provided for by law or authorized by an agency head or designee;

- (c) Any use for the purpose of assisting a campaign for election of a person to an office or for the promotion of or opposition to a ballot proposition. Such a use of state resources is specifically prohibited by RCW 42.52.180, subject to the exceptions in RCW 42.52.180(2);
- (d) Any use for the purpose of participating in or assisting in an effort to lobby the state legislature, or a state agency head. Such a use of state resources is specifically prohibited by RCW 42.17.190, subject to the exceptions in RCW 42.17.190(3);
- (e) Any use related to conduct that is prohibited by a federal or state law or rule, or a state agency policy; and
- (f) Any private use of any state property that has been removed from state facilities or their official duty stations, even if there is no cost to the state. (Emphasis added)

OMWBE Policies: (1) Standards of Ethical Conduct- Section 2(E) – Using State Resource,
(2) Internet Usage, Computer Software Usage and Electronic E-Mail Usage.

1. There is evidence to show that Mr. Ballard used his state issued computer to visit sites on the internet, which were not work related, but related to making a personal profit in the stock market.
2. There is evidence to show that Mr. Ballard sent/received e-mails to indicate he was conducting personal business from his state computer.
3. There is evidence to show that Mr. Ballard disrupted others in the office by getting them involved in lengthy discussions about the stock market, causing a further disruption or distraction from the conduct of the state's business.

III. RECOMMENDATION

WAC 292-100-050(2) provides that upon receipt of the board staff's preliminary investigation report and recommendation, the board shall determine whether or not there is reasonable cause to believe that a violation of chapter 42.52 RCW has occurred.

1. Mr. Ballard used his state owned computer to visit non-work related financial and stock market internet sites for personal profit during the time he was working for OMWBE.
2. Mr. Ballard sent/received non-work related e-mail that would indicate he was conducting personal business from his work computer.

Therefore, Board staff recommends that the Board find ***reasonable cause*** that a violation occurred with respect to the use of state resources to conduct personal business and use related to conduct that is prohibited by OMWBE policy.

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WAC 292-100-050(2) provides that upon receipt of the Board staff's investigation report and recommendation, the Board shall determine whether or not there is reasonable cause to believe that a violation of chapter 42.52 RCW has occurred.

Based on the preliminary investigation, the Executive Director recommends that the Board enter a finding of reasonable cause to believe a violation or violations of RCW 42.52 have occurred, and the penalty may be more than \$500.

Melanie de Leon
Melanie de Leon, Executive Director
Executive Ethics Board

IV. DETERMINATION

Based upon the above analysis and conclusions, and pursuant to RCW 42.52.420, we, the State of Washington Executive Ethics Board, determine the following:

Dismissal

- Any violation that may have occurred is not within the jurisdiction of the Board.
- The Complaint is obviously unfounded or frivolous
- Any violation that may have occurred does not constitute a material violation because it was:
 - Inadvertent and Minor
 - Cured

Reasonable Cause Determinations:

Reasonable Cause regarding the use of state resources to conduct personal business.

- There IS reasonable cause to believe that a violation of the Ethics in Public Service Act has been committed.
- There IS NOT reasonable cause to believe that a violation of the Ethics in Public Service Act has been or is being committed.

V. POTENTIAL PENALTY

- We believe that one or more violations of RCW 42.52 may have occurred, and the penalty may be MORE THAN \$500.00, allowing the use of an Administrative Law Judge at any administrative proceedings.
- We believe that one or more violations of RCW 42.52 may have occurred, and the penalty may be LESS THAN \$500.00, initiating a Brief Adjudicative Procedure without the use of an Administrative Law Judge.

VI. CONCLUSION

This matter is hereby dismissed based upon the Dismissal Determination found above.

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Upon one or more findings that there IS reasonable cause to believe that violation(s) of RCW 42.52 have occurred, IT IS HEREBY ORDERED that the Executive Director of the Board schedule a public hearing on the merits of the complaint.

Upon finding there IS reasonable cause to believe that violation(s) of RCW 42.52 have occurred and that penalty is less than \$500.00, IT IS HEREBY ORDERED that the Executive Director of the Board schedule a brief adjudicative proceeding under WAC 292-100-190 on the merits of the complaint.

Upon finding there IS NOT reasonable cause to believe that ANY violation(s) of RCW 42.52 have occurred, IT IS HEREBY ORDERED that the complaint is DISMISSED

DATED this 16th day of March 2012.

M. Williams III
Matthew Williams III, Chair

Lisa Marsh
Lisa Marsh, Vice-Chair

Linnaea Jablonski
Linnaea Jablonski, Member

Nancy Biery
Nancy Biery, Member